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IN THE

Supreme Court of the United States

OCTOBER TERM, 1978

NO. 78-539

D. DOYLE MIZE AND THE ADDIS CORPORATION,
Petitioners,

v.

STELLA DARROW, ET AL,
Respondents,

SOUTHDOWN, INC., A CORPORATION, ET AL,
Respondents,

D. DOYLE MIZE AND THE ADDIS CORPORATION,
Petitioners,

v.

CHARLES F. SPALDING, ET AL,
Respondents,

SOUTHDOWN, INC., A CORPORATION, ET AL,
Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

BRIEF FOR RESPONDENTS IN OPPOSITION

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INDEX

	Page
OPINIONS BELOW	1
JURISDICTION	2
QUESTION PRESENTED	2
STATUTES AND RULES INVOLVED	3
STATEMENT OF THE CASE	3
ARGUMENT	6
CONCLUSION	10
CERTIFICATE OF SERVICE	11

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BRIEF FOR RESPONDENTS IN OPPOSITION

OPINIONS BELOW

The final judgments of the District Courts (App. A & B of the Petition), which were appealed to the United

States Court of Appeals for the Fifth Circuit have not been reported. The opinion of the Court of Appeals (App. C of Petition) is reported at 574 F.2d 1333 (1978).

JURISDICTION

The jurisdictional requisites set forth in the Petition are generally correct. However, Petitioners inaccurately characterize this case as "proper" for review on writ of certiorari pursuant to Rule 19(b) of the Rules of the Supreme Court by alleging that the decision of the Fifth Circuit "conflicts with the decisions of three other circuit courts of appeals on the same matter . . ." and that "the opinion below decides an important question of federal law which has not been, but should be, settled by this Court." (P. 2 of Petition). As more fully developed herein, the opinion below is in harmony with prior decisional law and time-honored equitable considerations. Moreover, this case was decided on exceptional facts and circumstances, not on the basis of some important, unsettled question of federal law.

QUESTION PRESENTED

Whether a non-settling defendant in a derivative/class action, who coincidentally holds convertible debentures of the corporation, can challenge the partial settlement of the case under the guise of protecting the interests of the corporation, when the record demonstrates his true motives are inimical to the best interests of the corporation and its shareholders.

STATUTES AND RULES INVOLVED

The pertinent statutes and rules are set forth in the Petition at P. 3 and are reproduced at App. E-H of the Petition.

STATEMENT OF THE CASE

The Court has been called upon to review the Fifth Circuit's affirmance of the partial settlement of three class action-shareholders' derivative suits: Civil Action No. 75-H-728 (the *Darrow* case), Civil Action No. 75-H-764 (the *Spalding* case), and Civil Action No. 75-H-1043 (the *Cummings* case). Final judgment approving the partial settlement of *Darrow* and *Spalding* was rendered by District Judge Woodrow Seals of the Southern District of Texas. Judge Allen B. Hannay, also of the Southern District of Texas, approved the partial settlement of the *Cummings* suit. All three of the suits are factually related, were partially compromised by the same settlement agreement and were consolidated on appeal by the Fifth Circuit.

These three cases involve the corporate affairs of Southdown, Inc. (Southdown), a New York stock-exchange Company with conglomerate holdings and numerous operating subsidiaries. (R. Vol. I, 1-17). The cases were all brought derivatively for the benefit of Southdown, although *Darrow* and *Spalding* also contained class allegations on behalf of certain holders of Southdown's securities. The suits were brought to challenge improprieties in Southdown's spin-off of its formerly wholly-owned agriculture subsidiary, Valhi, Inc. (Valhi). (R. Vol. I, 1-17, 26-54). The spin-off was effected in

May, 1975, by the distribution of 100% of the common stock of Valhi to the common shareholders of Southdown. That spin-off and the corporate activities and management decisions attendant to it, spawned multiple litigation against the directors and officers of Southdown and Valhi, including the actions involved here.[1]

The *Darrow, Spalding* and *Cummings* suits sought a variety of relief, foremost among which were rescission of the spin-off, recovery of the wrongful profits which Mize and his cohorts received from the spin-off, and an injunction against any further, similar efforts to divide the Company.

In July, 1976, following extensive negotiations, Judges Seals and Hannay entered the final judgments which implemented the partial settlement of *Darrow, Spalding* and *Cummings*. The partial settlement agreement dismissed most of the directors of Southdown and Valhi (who discovery had indicated were only peripherally

1. Other litigation born of the Valhi spin-off includes: *Contran Corporation v. Farnham Corporation, et al,* Civil Action No. 75-H-1296, In the United States District Court for the Southern District of Texas; *Securities & Exchange Commission v. Doyle Mize, et al,* Civil Action No. 75-H-1420, on appeal to the United States Court of Appeals for the Fifth Circuit from the United States District Court for the Southern District of Texas; *Southdown, Inc. v. The Protective Committee for Responsible Management of Southdown, et al,* Civil Action No. 75-H-1967, United States District Court for the Southern District of Texas; and *Stanley Zuckerman v. Valhi, Inc., D. Doyle Mize, et al,* Civil Action No. 76-H-429, In the United States District Court for the Southern District of Texas. *Contran* concerned a tender-offer battle waged by Petitioner D. Doyle Mize to gain control of Valhi. Mize was enjoined from pursuing his competitive tender-offer based on Judge Seals' Finding of Fact and Conclusions of Law that Mize had usurped corporate opportunities and had otherwise violated the federal securities laws and his fiduciary responsibilities as an officer and director of Southdown. (1st Supp. R.—"*Contran* Findings of Fact and Conclusions of Law at 13-15, 17-18).

involved in the alleged wrongdoing), dismissed the Defendant class of common shareholders, eliminated certain claims against Southdown, and established a procedure by which nominees of the Protective Committee for the Responsible Management of Southdown assumed full control of the corporation. The substantial claims for equitable and monetary relief against Mize were expressly undisturbed by the court-approved settlement.

The effectuation of the partial settlement followed the mailing on July 6, 1976, of court-approved notices to the more than twelve thousand security holders of Southdown, each of whom was given until July 26, 1976, to file written objections to the settlement. Of the twelve thousand recipients of the notice, objections were received from only three: (1) Petitioners herein, D. Doyle Mize and his wholly-owned company, the Addis Corporation; (2) Leeland and Richard McCarthy, associates of Mize who were alleged below to have engineered the Southdown-Valhi spin-off with Mize, and, like Mize, were continuing Defendants after the partial settlement; and (3) Jean Appleman, who owned fifty shares of preferred stock and abandoned her objection prior to court approval of the compromise. It was in light of the virtual absence of shareholder objection to the settlement and the independent judgment of two district courts that the settlement was fair and reasonable, that final judgments were entered approving the partial settlements of these cases in July, 1976.

Only Mize and Addis, his wholly-owned company, appealed from the judgments approving the partial settlement. In affirming the lower courts' judgments, the Court of Appeals held that "the tenuousness of the harm

to Southdown that Mize asserts" measured against "his own exposure to substantial personal liability in the continuing litigation," bars further consideration of his objection on equity-based principles.

ARGUMENT

This case does not merit discretionary review by the High Court. At issue is the right of a non-settling, principal defendant to undermine the bona fide partial settlement of complex litigation, simply because the continuing defendant happens to hold promissory notes of the corporate party he is alleged to have plundered. There is no conflict among the circuit courts of appeal on the issue presented. There is no unsettled, important question of federal law lurking in the record. No amount of rhetoric, no amount of contortionistic case analysis, no amount of imagined "forum shopping" can transform the dogged efforts of a continuing defendant to upset a partial settlement, into an unresolved, important question of federal law.

First it should be noted that the issue of standing, which Petitioners have so broadly presented, is not properly before the Court. The Court of Appeals did not decide this case on pure standing grounds, but held simply "that on principles *akin* to standing, Mize and Addis cannot object to the settlement. . . ." 574 F.2d at 1336 (emphasis added). Indeed, rather than rejecting Mize's appeal outright, the Court of Appeals first viewed the character of Mize's objections to the settlement and then balanced those objections, purportedly made on behalf of the corporation, against Mize's self-interest as a party defendant:

> We hold that the tenuousness of the harm to Southdown that Mize asserts on this appeal, in comparison to his own exposure to substantial liability in the continuing litigation, requires us to affirm the District Courts' approval of the settlement agreement.

574 F.2d at 1337.

In determining the propriety of Mize's objection, the Court of Appeals discussed the equitable principles which underlie all shareholders' derivative actions and evaluated Mize's ability to object to the settlement by asking whether he would have been a proper representative of the corporation at the time this suit was first instituted. This is a sound, salutary approach, since the same considerations which affect the right of a party to initiate derivative litigation should apply to a party attempting to prevent its settlement. In both instances, a shareholder purports to act on behalf of his corporation. However, the Court of Appeals did not hold that standing to object to the settlement of a derivative claim is in all cases dependent on the objector's standing to have brought the suit in the first place.

What the Court of Appeals did decide is that Mize has an irreconcilable conflict of interest owing to his continuing involvement as a defendant, and contort as he might, Mize cannot transmogrify himself into Southdown's "apostle." 574 F.2d at 1337.

Petitioner's perceived conflict among the Third, Fifth, Sixth and Seventh Circuits does not exist. In *In re Pittsburgh & Lake Erie R.R. Co. Securities & Antitrust Litigation*, 543 F.2d 1058 (3d Cir. 1976), the court evaluated the standing of a stock pledgee to object to the

settlement of a derivative action in light of the standing requirements applicable to the institution of a case under Rule 23.1. That decision is entirely consistent with the Fifth Circuit's analysis in this case. Petitioner cites two other principal cases in an effort to show a conflict among the circuits: *Cohen v. Young,* 127 F.2d 721 (6th Cir. 1942), and *Tryforos v. Icarian Development Co.,* 518 F.2d 1258 (7th Cir. 1975), *cert. denied,* 423 U.S. 1091 (1976). Neither *Cohen* nor *Tryforos* is applicable to the case at bar. Each deals with the contemporaneous-ownership requirement of Rule 23.1, which the Court recently embellished in *Bangor Punta Operations, Inc. v. Bangor & Aroostoock R.R. Co.,* 417 U.S. 703 (1974). None of the cases which Petitioner cites addresses the right of a self-interested defendant, under the pretense of protecting a corporation, to contest the settlement of litigation in which he remains a party.

The Court of Appeals reached the right result in this case for the right reason. As the engineer of the wrongdoing which forms the basis of the substantive claims in these cases, Mize should not be permitted to bargain for his own personal release from litigation under the guise of protecting Southdown, when all the while he seeks only to further his individual interests. It was precisely this motive which the District Court detected at the hearing to determine the fairness of the settlement, when Judge Seals observed:

> I don't think it's to the interest of the McCarthy brothers or Mr. Mize to settle the case now. I think it's to their interest to delay the case, really, notwithstanding the fact that they have an interest in the company.

(R. Vol. V, 47). Similarly, Mize's true motivation in objecting to the settlement formed the basis of the Court of Appeals' decision.

In *Seiden v. Nicholson,* 72 F.R.D. 201, 205 (N.D. Ill. 1976), the court approved the partial settlement of a combined class action and derivative suit, and in so doing noted:

> Only two persons objected to the settlement in question. . . . Both . . . are the lawyers who have had extensive business dealings and legal conflicts with [the settling corporation].
>
> * * *
>
> In short, it is clear . . . that they are embroiled with [the corporation] in a series of conflicts for large stakes. Under these circumstances, one must view with skepticism the claim of [the two objectors] that they are challenging the instant settlement because it is unfair to [the corporation]. Objections to class action and derivative settlements cannot be used to gain leverage in other disputes. Objectors cannot enter a proceeding purporting to protect a corporation or a class and instead use the proceedings for their own ulterior purposes that could harm the interests of the class and corporation by delay, expense, confusion, and the loss of a favorable settlement.

The same reasoning is equally applicable here. There is no genuine basis for disturbing this settlement or for reviewing the decisions of the lower courts.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that this Petition for a Writ of Certiorari should be denied.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on this 27th day of October, 1978, three copies of the foregoing Brief for Respondents in Opposition to the Petition for a Writ of Certiorari were served on Petitioners and all other parties required to be served by placing same in the United States mail, postage prepaid, sent certified mail, return receipt requested, to the following attorneys of record:

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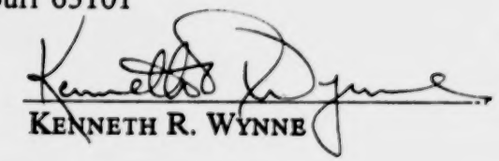

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